

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

TONY PENWELL,

CASE NO. 2:21-cv-00547-DGE

Plaintiff,

## ORDER ADOPTING REPORT AND RECOMMENDATION

WASHINGTON STATE DEPARTMENT  
OF CORRECTIONS et al,

Defendant.

On April 23, 2021, Plaintiff, proceeding pro se, filed a civil rights action filed pursuant to 42 U.S.C. § 1983, federal statutes, and the Washington State Constitution alleging that Defendants retaliated against him for his actions as a “tier rep,” including removing him from his prison job and offering in replacement only jobs that were inconsistent with plaintiff’s disability and religious beliefs. (Dkt. No. 1-1 at 5-27.) Plaintiff further alleges that Defendants failed to properly process his grievances related to this issue, and that the manner of Defendants’ assignment of jobs violated Plaintiff’s Fourteenth Amendment right to equal protection. (*Id.*)

1           On May 3, 2021, Plaintiff filed a motion for leave to proceed in forma pauperis (“IFP”).  
2 (Dkt. No. 6.)

3           On July 20, 2021, United States Magistrate Judge Theresa Fricke issued a report and  
4 recommendation (“R&R”) recommending that Plaintiff be denied IFP status because he has  
5 accumulated at least three “strikes” pursuant to 28 U.S.C. §1915(b) and did not demonstrate that  
6 he was ““under imminent danger of serious physical injury” sufficient to warrant an exception to  
7 the three strikes provision. (Dkt. No. 8.)

8           The Prison Litigation Reform Act (“PLRA”), 28 U.S.C. § 1915, governs in forma  
9 pauperis (“IFP”) proceedings. The Court may permit indigent litigants to proceed in forma  
10 pauperis upon completion of a proper affidavit of indigency under 28 U.S.C. § 1915(a)—but, the  
11 Court has broad discretion in denying an application to proceed in forma pauperis. *Weller v.*  
12 *Dickson*, 314 F.2d 598, 600 (9th Cir. 1963).

13           Under § 1915(a), a district court may waive the filing fee for civil complaints by granting  
14 IFP status to individuals unable to afford the fee. *Andrews v. Cervantes*, 493 F.3d 1047, 1051–  
15 52 (9th Cir. 2007). “To address concerns that prisoners proceeding IFP were burdening the  
16 federal courts with frivolous lawsuits, the PLRA altered the IFP provisions for prisoners in an  
17 effort to discourage such suits.” (*Id.*) (citing *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 312 (3rd  
18 Cir. 2001) (en banc)).

19           Indigent prisoners still receive IFP status if they meet the requirements, but according to  
20 § 1915(b), prisoners who seek to proceed IFP must pay the filing fee when funds become  
21 available in their prison accounts. 28 U.S.C. §1915(b); *Cervantes*, 493 F.3d at 1051.  
22 “Additionally, prisoners who have repeatedly brought unsuccessful suits may entirely be barred  
23 from IFP status under the three-strikes rule.” *Cervantes*, 493 F.3d at 1051-52.

1       The “three-strikes rule,” contained in §1915(g) provides that: “[i]n no event shall a  
2 prisoner bring a civil action under this section if the prisoner has, on 3 or more prior occasions,  
3 while incarcerated or detained in any facility, brought an action or appeal in a court of the United  
4 States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim  
5 upon which relief may be granted, unless the prisoner is under imminent danger of serious  
6 physical injury.”

7       The PLRA’s strike provision does not distinguish between dismissals with prejudice,  
8 dismissals without prejudice, actions dismissed on the merits, or actions dismissed pursuant to  
9 the PLRA’s screening provisions. *O’Neal v. Price*, 531 F.3d 1146, 1154-55 (9th Cir. 2008).  
10 When an application is rejected pursuant to the screening provisions of 28 U.S.C. § 1915 and the  
11 case is dismissed, the dismissal counts as a strike. (*Id.* at 1155.)

12       Here, Judge Fricke cited three cases filed by Plaintiff in this Court that were dismissed  
13 for failure to state a claim upon which relief could be granted. (Dkt. No. 8 at 3-4.)

14       Plaintiff does not deny that these cases constitute “strikes” as defined by § 1915(g) but  
15 argues that these cases had merit and would have been successful had he been able to articulate  
16 himself properly at the time. (Dkt. No. 9 at 1-2.) Plaintiff contends that he has filed successful  
17 claims, and argues for the creation of a “strike buy back” program that would allow prisoners to  
18 erase strikes from their records once they pay their outstanding IFP debts. (*Id.* at 4.) Plaintiff  
19 further argues that the law should permit prisoners to proceed IFP to prevent both physical and  
20 mental harm. (Dkt. No. 10 at 1-3.)

21       Whatever the merits of Plaintiff’s proposals, the Court does not have the authority to  
22 create a program like the one Plaintiff suggests, nor is it able to unilaterally amend 28 U.S.C. §  
23 1915(g) to include imminent mental injury as an exception to the three strikes rule.

1 The Court, having reviewed Plaintiff's complaint, the Report and Recommendation of the  
2 Honorable Theresa Fricke, United States Magistrate Judge, any objections thereto, and the  
3 remaining record, hereby finds and ORDERS as follows:

4 (1) The Report and Recommendation is ADOPTED;  
5 (2) Plaintiff's application to proceed IFP (Dkt. No. 6) is DENIED.  
6 (3) Plaintiff is directed to pay the \$402.00 filing fee within thirty (30) days of this Order.

7 Failure to timely submit the requisite fee will result in dismissal of this case without  
8 prejudice.

9 (4) As Plaintiff has incurred three strikes under 28 U.S.C. § 1915(g), the Court finds  
10 Plaintiff may not proceed with IFP status in the event of any appeal.  
11 (5) The Clerk is directed to send copies of this Order to Plaintiff.

12  
13 Dated this 3<sup>rd</sup> day of February, 2022.

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16 David G. Estudillo  
17 United States District Judge  
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